No. 20030

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a Corporation,
Petitioner.

vs.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITIONER'S CLOSING BRIEF

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I.

COUNTER STATEMENT OF FACTS

Respondent Federal Communications Commission in its reply brief has alleged that petitioner's statement of the case is misleading and incomplete but nowhere does it specifically spell out such inaccuracies. The record, as shown by the Federal Register from the date of November 21, 1946 *(11 FR 13704)* until 1960 is quite clear that "The possible uses of this service are as broad as the imagination of the public and the ingenuity of equipment manufacturers can devise." No specific prohibition on social, hobbying, personal or business use was originally contained in Part 19. It was an "all purpose band." Further, the Commission intended to keep to a miuimum its rules

and regulations governing the service. See *11 FR 13705.*

For many years the Commission has been stating that there are no more channels available for the Citizens Band. It is interesting to note that the courts have gone along with the aforesaid declaration. The court rulings have been based entirely upon unchallenged Commission expertise. No one has been allowed to introduce evidence in rebuttal to the Commission's position, or if so, no particular weight has been attached thereto. Petitioner states in rebuttal that the radio spectrum is boundless. It extends from zero cycles per infinity to quantum mechanical-spectrural presentations of numerical cycles per unit of relative time, the bounds of which are unknown, due to lack of knowledge. However in 1965 the Commission stated in its annual report on page 172 as follows:

> "Improvements have been made in the channel occupancy recorders for VHF and UHF. Further laboratory observations verify the great imbalance in channel loading between different licensed services, and the existence of numerous vacant channels."

Attention is called to page 143 of the 1965 annual report of the respondent FCC. There the following statement is made:

> "About three-quarters of a million licenses now use this low-power, short-distance radio service to meet their varied radio communication needs

> on land, sea and in the air. They constitute the largest single group of station licenses. Although applications for citizens radio station licenses continued to be filed in large numbers, the total submitted in fiscal 1965 was about 20% less than in the previous year . . . Final action on a major revision of the rules governing this radio service was taken (docket 14843) in fiscal 1965. These new rules, designed to emphasize and strengthen long-standing limitations upon permissible communications, became effective April 26, 1965. Initial enforcement efforts indicate that responsible licensees are adhering to the new rule provisions. Nevertheless, numerous violations are still occurring and a stepped-up program of education and enforcement is underway to help preserve the usefullness of the service."

Obviously, from the foregoing, the rules the respondent Commission adopted in 1965, and which are the subject of this controversy, have caused the general public to lose interest in obtaining a CB license to some extent and have failed in their purpose in decreasing violations of the rules. From the foregoing, the only conclusion to be reached is that the foregoing rules have been a complete failure and should not be continued.

II.

QUESTIONS PRESENTED

Respondent Commission states on page 13a of its Brief that it considers that only two questions are

presented. These are in connection with freedom of speechc and any possible violation of procedural rights under the Communications Act or Administrative Procedure Act. The specifications of error outlined by appellants are mainly ignored.

In respondent's Summary of Argument on page 14 it states that petitioner has failed to show that the limitations imposed by the Commission's rules are in any way unreasonable or contrary to the public interest standard of the Communications Act. In support of its action respondent has cited *Lafayette Radio Electronics Corp.* v. *U.S.*, 345 F 2d 278 (2nd Cir. 1965). The foregoing action was filed on Friday, April 23, 1965 and heard on Monday, April 26, 1965. The reviewing court did not have the record before it as it would have been physically impossible to have prepared the same between Friday and Monday. The petitioner therein was a manufacturer and seller of electronic equipment as well as a licensee, and the decision therein was apparently based at least in part on the question of hobbying. Petitioner herein is not urging this court to permit hobbying, but has raised many basic and fundamental issues which were not presented in *Lafayette*, supra.

Respondent relies heavily for its authority on *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190 (1943). It states on page 29 of its Brief that adjudicatory hearings were not held. However, on page 195 of the aforesaid decision the court states that public

hearings were held for seventy-three days, notice was sent to the station licensees involved, all were invited to appear and finally that briefs were submitted.

Respondent cites as its authority for rule making without hearing even though a license may be affected (page 15 of respondent's brief) *Federal Power Commission* v. *Texaco*, 377 U.S. 33; *American Airlines* v. *Civil Aeronautics Board*, 359 F 2nd 624; *Superior Oil Co.* v. *Federal Power Commission*, 322 F 2nd 601; *Willapoint Oysters* v. *Ewing*, 174 F 2nd 676. Petitioner wishes to point out that the aforesaid are readily distinguishable from the case at bar in that they all involved applications (except Willapoint) for either new licenses or permission to engage in certain activities. They had acquired no rights which were about to be curtailed or taken away, but were seekers of new rights or privileges. No existing licenses were being modified.

1. Necessity for Publication

Respondent states on page 16 of its brief that it "is not required to publish in advance every precise proposal which may ultimately be adopted." *Willapoint*, supra and *Wilson and Co.* v. *U.S.*, 335 F 2nd 788 are cited as authority. *Willapoint* stated that it was sufficient to let the petitioner know what issues it would face at a hearing to be held. *Wilson*, supra, concerned telegraph rates, and it was held that the notice was as specifiic as the commission could make it

read. However, neither case involved the imposition of criminal penalties for violation of the regulations as does the case herein. As pointed out in petitioner's opening brief on page 36 thereof, violations of the directives of Commission Rule 95.83 are now criminal and subject to punishment under 47 USC 501 and 502. Rules with criminal penalties for violation thereof should be published to afford certainty. *Hotch* v. *United States*, 212 F 2nd 280 is a case in point. Hotch was convicted of fishing in violation of a regulation of the Department of the Interior extending the period closed to commercial fishing on the Taku Inlet in Alaskan waters. The 9th Circuit Court affirmed holding that the regulation was valid. On petition for rehearing, Hotch raised for the first time that the regulation was not effective in that it had not been published in the Federal Register. The Court reversed the conviction, holding that actual knowledge would not be sufficient. The case states on page 282:

> "The Congressional directive in regard to the procedure to be followed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power. In the case before us, neither notice that a regulation extending the closed period on the Taku inlet was to be issued, nor the proposed regulation itself was published in the Federal Register. The failure to comply with either of the referred to provisions of the Administrative Procedure Act means that the procedure laid

> down by Congress for the implimentation of agency rules has not been met."

It would seem from the *Hotch* case, supra, that in order to render a criminal statute effective the agency must strictly follow the provisions of 5 USC 1002 a (3) which states:

> "Every agency shall separately state and currently publish in the Federal Register . . . (3) substantive rules adopted as authorized by law."

2. Necessity for Hearing

Petitioner has pointed out in its opening brief that 47 USC 316 (a) provides that no hearing is required on a modification of a license unless one is requested. (See page 26 thereof). Respondent states on page 26 in its brief "That because of the very large number of licensees in the service it would be impracticable, if not impossible to obtain individual consent to the rules or to afford separate hearings." Such argument is fallacious in that 316a does not require the Commission to obtain individual consent and to afford separate hearings. A hearing is only granted upon request. The record herein will disclose that probably not more than six or eight participants requested a hearing. Petitioner herein was one of those who did. Respondent in the matter herein, should have held a hearing in a convenient place and invited those who requested the same to attend.

Respondent has cited as authority *Airline Pilots Association International* v. *Quesada*, 276 F. 2nd 892. Therein the FAA had issued a regulation without a hearing that all airline pilots over the age of sixty would no longer be issued a certificate which would enable them to fly in such occupation. This case can be distinguished from the matter herein that public safety required urgent, immediate action. Taking the extended time necessary for the holding of hearings would not be in the public interest in that air crashes might result in the interim.

III.

CONCLUSION

For the reasons as outlined in its opening and closing briefs, petitioner submits that the rules of respondent Commission which were effective April 26, 1965 should be set aside and the case remanded to the said Commission for hearing and further proceedings.

Dated: October 6, 1966, Oakland, California.

Respectfully submitted,

SEA AND HANNA

Attorneys for Petitioner

I certify that in conjunction with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

DONALD M. SEA